IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAACO ENTERPRISES, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
SCOTT S. BREMNER	:	
and.	:	
SERVICE AND SUPPLY GROUP, LTD.	:	NO. 98-CV-2727

MEMORANDUM AND ORDER

J. M. KELLY, J. **SEPTEMBER , 1998**

The court has now considered the testimony that has been presented in this case and is prepared to make its Findings of Fact and Conclusions of Law and decision.

FINDINGS OF FACT

1. Plaintiff, Maaco Enterprises, Inc. (“Maaco”), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business at 381 Brooks road, King of Prussia, PA 19406.
2. Defendant, Scott S. Bremner (“Bremner”), is a resident and citizen of the State of Wisconsin.
3. Defendant, Service & Supply Group, Ltd. (“SSG”) is a corporation organized and existing under the laws of the State of Illinois and is wholly owned and controlled by Bremner.
4. Maaco is engaged in the business of franchising Maaco Auto Painting and Bodyworks Centers which specialize in automobile painting and body repair and other automotive

products and services.

5. Maaco franchisees are licensed to use the trade names, service marks and trademarks of Maaco and to operate under the Maaco business system, utilizing specially designed buildings with special equipment, equipment layouts, interior and exterior accessories, identification schemes, products, management programs, standards, specifications, proprietary marks and information.

6. Maaco invests a significant amount of time, money and resources to teach its new franchisees the Maaco business system and to assist and support its franchisees to open, establish and develop their centers.

7. The relationship between Maaco and its franchisees is governed by the terms and conditions of the Franchise Agreement entered into between Maaco and each franchisee.

8. On June 5, 1996, Maaco and Bremner entered into a Franchise Agreement (the “Franchise Agreement”), under which Bremner was granted the right and undertook the obligation to operate a Maaco Auto Painting and Bodyworks Center at 3026 Washington Street, Waukegan, IL 60085 (the “Center”).

9. The term of the Franchise Agreement was fifteen (15) years.

10. On June 5, 1996, Maaco, Bremner and SSG entered into an Assignment and Assumption Agreement (the “Assignment”). The Assignment was entered into by Maaco at Bremner’s request so that Bremner could operate his Maaco Center through SSG.

11. Under the Assignment, Bremner transferred his rights in the Franchise Agreement to SSG, and SSG assumed all of Bremner’s

obligations under the Franchise Agreement.

12. Bremner, however, agreed to continue to be bound by the provisions of the Franchise Agreement and agreed to guarantee all of SSG’s obligations under the Franchise Agreement.

13. Under the terms of the Franchise Agreement, Bremner and SSG were required, among other things: (a) to pay to Maaco a weekly royalty fee equal to a percentage of the gross receipts generated by the Center; (b) to submit weekly reports to Maaco of the gross receipts generated by the Center; and (c) to pay Maaco an advertising contribution for use in an advertising fund, all as set forth more fully in the Franchise Agreement.

14. Under paragraph 24E of the Franchise Agreement, Bremner and SSG agreed that if Maaco instituted an action at law or in equity against them to enforce the terms of the Franchise Agreement, Maaco would be entitled to recover, in addition to any judgment, reasonable attorney’s fees, court costs and litigation expenses.

15. Maaco invested significant time, money and resources in training and assisting Bremner and SSG in its business system to open, establish and develop their Center as a Maaco franchise.

16. Almost immediately after Bremner and SSG began operating their Center, they breached the Franchise Agreement by failing to pay royalty fees and make required advertising contributions.

17. By Notice of Default dated August 7, 1996 (the "1996 Notice"), Maaco advised Bremner and SSG of their defaults under the Franchise Agreement.

18. The Notice of Default further advised Bremner and SSG that if their defaults were not cured within 15 days, Maaco reserved the right to terminate the Franchise Agreement and to pursue its remedies under the Franchise Agreement.

19. As a result of Bremner and SSG's failure to cure their defaults, Maaco terminated the Franchise Agreement on October 17, 1996.

20. On October 18, 1996, Maaco filed a Civil Action Complaint against defendants in the Court of Common Pleas, Montgomery County captioned Maaco Enterprises, Inc. v. Scott Bremner and Service and Supply Group, Ltd., October Term, 1996 No. 96-18328.

21. In reliance on defendants' representations that they would remain current in all Franchise Agreement obligations, Maaco agreed to dismiss the Montgomery County action and to conditionally reinstate the Franchise Agreement.

22. On December 13, 1996, defendants entered into a Conditional Reinstatement of Franchise Agreement (the "Conditional Reinstatement"). Pursuant to the terms of the Conditional Reinstatement, defendants agreed to remain current under the terms of the Franchise Agreement and to execute an interest-bearing Note and Security Agreement for the past due amounts owed to Maaco. The Note and Security Agreement in the amount of $9,296.54 was executed by defendants in favor of

Maaco on December 13, 1996.

23. After the Montgomery County action was dismissed, Bremner and SSG failed to meet their obligations under the Franchise Agreement as conditionally reinstated, by failing again to submit weekly reports, royalty fees and advertising contributions to Maaco. In addition, defendants failed the required payments due under the Note and Security Agreement.

24. By Notice of Default dated January 7, 1998 (the "1998 Notice"), Maaco again advised Bremner and SSG with notice of their defaults under the Franchise Agreement and under the Note and Security Agreement and provided them with an opportunity to cure.

25. Upon receipt of the 1998 Notice, Bremner contained Maaco to discuss resolving the defaults.

26. Without waiving any of its rights under the Franchise Agreement, Maaco agreed to permit Bremner and SSG to attempt to cure their defaults and otherwise comply with their obligations under the Franchise Agreement. This agreement was memorialized in a February 11, 1998 letter agreement (the "Letter Agreement").

27. Pursuant to the terms of the Letter Agreement, Bremner and SSG executed a Demand Note and Security Agreement (the "Demand Note") in the amount of $42,365.01 representing their indebtedness to Maaco as of February 9, 1998. Upon receipt of the executed Demand Note, the Note and Security Agreement was marked "Satisfied".

28. Under the terms of the Demand Note, defendants were not

required to make payments to Maaco for their past due indebtedness under June 1, 1998, unless defendants failed to remain current in their Franchise Agreement obligations.

29. The Demand Note contains a provision authorizing confession of judgment against Bremner and SSG for the principal amount of the Demand Note, together with costs, interest and attorney’s fees upon any default.

30. Bremner and SSG failed to honor the terms of the Letter Agreement and otherwise failed to cure their defaults under the Franchise Agreement.

31. Bremner and SSG defaulted under the Demand Note by failing to remain current in all of their Franchise Agreement obligations.

32. On April 17, 1998, Maaco served Bremner and SSG with a Supplemental Notice of Default/Demand for Payment Under the Demand Note (the “Supplemental Notice”).

33. In the Supplemental Notice, Maaco again advised Bremner and SSG that they were required under the Franchise Agreement as conditionally reinstated to cure their defaults and to honor their Franchise Agreement obligations.

34. Defendants failed to cure their defaults and their indebtedness to Maaco increased.

35. By Notice of Termination dated May 26, 1998, Maaco advised Bremner and SSG that their Franchise Agreement was terminated.

36. Pursuant to paragraphs 15A-15D of the Franchise Agreement, Bremner and SSG agreed upon termination of the Franchise

Agreement, they would cease using Maaco's trademarks, service marks, trade names and trade dress and otherwise cease holding themselves out as authorized ma franchisees.

37. Pursuant to paragraph 17 of the Franchise Agreement, Bremner and SSG agreed that upon termination of the Franchise Agreement, they would not, for a period of one year, operate a business similar to their former Maaco franchise within a ten mile radius of the Center.

38. On May 27, 1998, Maaco commenced this action against Bremner and SSG and sought to enjoin Bremner and SSG's unauthorized use of its trademarks, to enforce the covenant not to compete contained in Franchise Agreement, to recover money damages for breach of the Franchise Agreement, an accounting, to recover lost future royalty payments and to confess judgment on the Demand Note.

39. Bremner and SSG were served with the summons and complaint on June 11, 1998.

40. Bremner and SSG have failed to answer or otherwise respond to Maaco's complaint.

41. On June 24, 1998, Maaco filed a Motion for Preliminary and Permanent Injunction ("Motion for Injunction") to enforce the covenant not to compete and to prevent defendants from continuing to use Maaco's trademarks. The Motion for Injunction was served on defendants and their counsel by first class mail on June 24, 1998.

42. Defendants never responded to the Motion for Injunction.

43. At some time after termination of the Franchise Agreement,

Bremner and SSG removed the signs at the Center bearing Maaco's trademarks and have apparently ceased using Maaco's trademarks in the operation of their business.

44. Bremner and SSG continue to operate an automobile painting and body repair business at 3026 Washington Street, Waukegan, IL 60085.

45. On June 10, 1998, Maaco filed its Request for Default and Motion for Entry of Default Judgment ("Motion for Default Judgment"), seeking entry of a judgment against defendants and requesting a hearing on the non-monetary claims in Maaco's complaint. The Motion for Default Judgment was served on defendants and their counsel by first class mail on July 10, 1998.

46. By Order dated September 1, 1998, the Court scheduled a hearing for September 14, 1998 on Maaco's Motion for Injunction and Motion for Default Judgment. copies of the Order for Hearing were sent to defendants by the Court on September 1, 1998.

47. As directed by the Court, Maaco also served copies of the Order for Hearing on defendants by overnight mail and on their counsel by certified mail on September 4, 1998.

48. On September 14, 1998, a hearing was held by this Court on Maaco's Motion for Preliminary Injunction and Motion for Default Judgment. Maaco presented the testimony of its Vice-President of Licensing, Diana Dieciedue, in support of its Motions. Defendants did not appear at the hearing.

CONCLUSIONS OF LAW

1. Pennsylvania law applies to the facts of this case because no true conflict of law exists between Illinois and Pennsylvania regarding the enforcement of covenants not to compete.
2. Bremner and SSG have failed to answer or otherwise respond to Maaco's complaint within the time required by Fed.R.Civ.P. 12(a)(1)(A).
3. Maaco is entitled to a judgment by default on its claims for an injunction to enforce the Franchise Agreement's covenant not to compete, money damages for breach of the Franchise Agreement, an accounting and lost future royalty payments. Fed.R.Civ.P. 55(a).
4. Maaco is also entitled to a judgment by confession on amounts owed under the Demand Note.
5. Pursuant to paragraph 24E of the Franchise Agreement, ma is also entitled to recover, in addition to any judgment on its claims, reasonable attorney's fees, court costs and litigation expenses.
6. Pennsylvania recognizes the enforceability of restrictive covenants. Piercing Pagoda, Inc. v. Hoffner, 465 Pa. 400, 351, A.2d 207, 210 (1976); In re Talmage, 758 F.2d 162 (6th Cir. 1985).
7. Bremner and SSG are bound by the restrictive covenant they executed as part of the Franchise Agreement.
8. The restrictive covenant contained in the Franchise

Agreement was supported by adequate consideration.

9. Because the covenant only restricts Bremner and SSG from operating a business substantially similar to their Maaco franchise within a ten mile radius of their Center for a period of one year, the cost of the covenant in reasonable in both time and territory. Piercing Pagoda, Inc. v. Hoffner, 465 Pa. 500, 351 A.2d 107, 210 (1976).

10. Bremner and SSG, by their continued operation of a business substantially similar to their former Maaco franchise, are in breach of their post termination obligations under the Franchise Agreement.

11. Bremner and SSG's operation of an automobile painting and repair shop at the site of their former Maaco franchise will cause Maaco irreparable injury because Maaco will have difficulty refranchising Bremner and SSG's trading area, business will be diverted from Maaco's authorized franchisees, Maaco's relationships with its authorized franchisees and the integrity of the Maaco System will be impaired, and Bremner will be unjustly enriched by using the knowledge and experience gained from Maaco to serve former and potential customers of Maaco.

12. A balancing of the hardships of the parties favors the enforcement of the restrictive covenant.

13. The irreparable harm that Maaco will suffer if an injunction was not issued outweighs the self-inflicted harm Bremner and SSG may suffer if an injunction issues. Any harm suffered by Bremner and SSG was brought on by themselves as a result of

their breach of the Franchise Agreement.

14. Maaco is entitled to the benefit of its bargain with Bremner and SSG.

15. Maaco's immediate and irreparable harm will increase unless and until Bremner and SSG are enjoined from violating their post-termination obligations and otherwise competing unfairly with Maaco.

16. Enforcement of Bremner and SSG's restrictive covenant is in the public interest. Novus Franchising, Inc. v. Taylor, 796 F. Supp. 122, 132 (M.D. Pa. 1992).

17. Maaco has no adequate remedy at law because it cannot be adequately compensated for the harm inflicted on its relationships with its franchisees, its inability to refranchise defendants' trading area, and the deprivation and dilution of the consumer recognition and goodwill built up under the Maaco trademarks, trade dress and business system over many years.

18. A preliminary injunction is the only method by which Maaco can prevent further misuse of its business system and trade secrets and the unfair competition presented by Bremner and SSG's continued operation of an automobile painting and body repair shop.

19. Bremner and SSG breached the Franchise Agreement by failing to pay Maaco royalty fees and advertising contributions in the amount of $20,020.17, plus all amounts due for weeks in which Bremner and SSG failed to submit their required weekly reports to Maaco.

20. Maaco is entitled to money damages for Bremner and SSG's breach of the Franchise Agreement.
21. Maaco is entitled to an accounting of the gross receipts generated by Bremner and SSG's Center for the weeks ending April 10, 1998 through the termination of the Franchise Agreement.
22. In addition to any judgment, Maaco is entitled to its reasonable attorney's fees, court costs and litigation expenses incurred as a result of its institution of this action to enforce its rights under the Franchise Agreement and Demand Note.
23. Pursuant to paragraph 11B of the Franchise Agreement, Bremner and SSG were obligated to submit weekly reports of gross receipts to Maaco.
24. Bremner and SSG failed to submit the reports as required.
25. The amount of gross receipts is peculiarly in the knowledge of Bremner and SSG and Maaco requires an accounting of these gross receipts in order to calculate any additional royalty fees owed to it by Bremner and SSG.
26. Under the terms of the Franchise Agreement, Maaco is entitled to the royalty fees payable on the unreported gross receipts from Bremner and SSG's Center from April 10, 1998 through the termination of the Franchise Agreement on May 26, 1998.
27. Maaco is entitled to recover the lost future royalties which it would have received but for Bremner and SSG's continuing defaults which led to the termination of the Franchise

Agreement thirteen years early. Sparks Tune-Up Centers, Inc. v. Addison, Bus. Franchise Guide (CCH) ¶9,563 (3d Cir. 1990).

28. Unless required to pay future royalties, Bremner and SSG will have derived a great deal of benefit from Maaco and use of its business system in that they continue to operate an automobile painting and repair facility without paying the bargained for consideration. In re Montcastle, Bus. Franchise Guide (CCH) ¶10,534 (W.D.N.C. Bankr. 1994).

29. Maaco is entitled to a judgment by confession against Bremner and SSG in the amount of $45,063.55, representing the principal, costs, interest and attorney's fees, all as authorized by the confession of judgment clause contained in the Demand Note.

30. Bremner and SSG, by failing to remain current on their Franchise Agreement obligations, are in default under the Demand Note.

31. Maaco has filed all the required documents to support the entry of the judgment by confession. Pa.R.Civ.P. 2951 and 2952.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAACO ENTERPRISES, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
SCOTT S. BREMNER	:	
and.	:	
SERVICE AND SUPPLY GROUP, LTD.	:	NO. 98-CV-2727

O R D E R

AND NOW, this day of September, 1998, in consideration of the foregoing Findings of Fact and Conclusions of Law, the Court enters the following Order:

1. Judgement is ENTERED in favor of Plaintiff, Maaco Enterprises, Inc. and against Defendants Scott S. Bremner and Service and Supply Group, Ltd., in the amount of $45,063.55, which represents the principal, costs, interest and attorney's fees.

2. If either Defendant objects to counsel fees in the amount of $12,980.50 and costs of $287.22, the objecting defendant/s shall have ten (10) days after the date of this Order to file written objections to the allowance for counsel fees and costs.

3. If no objection is filed after ten days of the date of this Order, this case is to be considered closed.

BY THE COURT:

_____

JAMES McGIRR KELLY, J.